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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 14

ROBERT M. WIEMAN; NANCY KENT ZIEBUR; WERNER C. BAUM; SAMUEL HUNT LEE, JR.; MALCOLM CORRELL; LILLIAN A. SCHMOE, and LUELLA NIETZ,

Appellants,

versus

PAUL W. UPDEGRAFF; THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES; A. S. J. SHAW, State Treasurer of the State of Oklahoma, and WILBURN C. CARTWRIGHT, State Auditor of the State of Oklahoma,

Appellees.

Appeal from the Supreme Court of the State of Oklahoma

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*.

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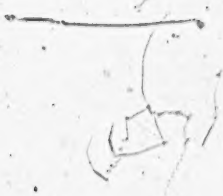

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of American Civil Liberties Union, as *Amicus Curiae*

The American Civil Liberties Union is appearing herein with the written consent of the parties, through their attorneys, which has been filed with the Clerk of this Court.

The objective of the American Civil Liberties Union, a nationwide, nonpartisan organization, is the advancement of the fundamental liberties guaranteed by the Constitution. Among the important issues concerning government's

relation to the individual, in the instant appeal, are freedom of religious belief and political expression from unreasonable suppression, as well as the protection guaranteed by due process of law against ill-focussed, vague legislation that leaves the citizen uncertain as to the boundary between legality and illegality.

The American Civil Liberties Union does not, of course, favor the particular religious belief of appellants, nor any particular political opinion or association; it is concerned with the instant case because the best assurance of democratic liberties for any member of our society is their preservation for all members, regardless of the merit of the opinion or association involved in the specific case.

Points to be Argued by Amicus

1. The State's requirement of an Oath to bear arms as a condition for any employment by the State is an unconstitutional deprivation of the freedom of religion and opinion guaranteed by the due process clause of the Fourteenth Amendment.

2. The State's requirement of an Oath of non-affiliation with unnamed organizations, as a condition for any employment by the State, violates the due process guarantee of the Fourteenth Amendment because it involves an excessive delegation of legislative power and because it is vague, uncertain, and an unreasonable restraint on freedom of association.

3. The State's prohibition of any employment by the State except upon subscription to an Oath denying past membership in unnamed organizations, violates the due process guarantee of the Fourteenth Amendment and Article I, Section 10 of the Constitution prohibiting ex post facto laws and bills of attainder.

Facts

The facts are stated in appellants' brief.

Summary of Argument

I. In view of appellants' religious opposition to bearing arms, the State's requirement that they take an Oath of willingness to bear arms in order to retain their State employment, or be eligible for any State employment, was an exercise of coercion upon their religious practice and conviction. This restraint upon religious freedom is unjustified. For willingness to bear arms is not, under this Court's decisions, a necessary factor in attachment to the principles of the Constitution or a necessary duty of good citizenship; unwillingness shows no dissatisfaction with our form of government, but merely non-conformist thought as to the right method of defending it. Since willingne - to bear arms does not therefore reflect on fitness for Government employment and the Oath provisions must have a reasonable relation to fitness, the Oath provision on arms-bearing is an unconstitutional interference with freedom of religion and opinion.

II. In requiring a State employee to swear that he is not affiliated with any organizations listed as "a communist front or subversive" by the United States Attorney General, the Oklahoma Legislature did not consider or appraise the organizations listed by the Attorney General; and it formulated no policy except that affiliation with an organization was proscribed if the Attorney General had applied to it the words "communist front" or "subversive". By accepting sight unseen whichever of the possible divergent meanings the Attorney General had adopted in applying these vague terms, the Legislature failed to fully and properly discharge the legislative function, in violation of the due process guarantee of the Fourteenth Amendment.

The Oath provision on non-affiliation further violates the due process guarantee because of its vagueness and uncertainty. Not only were the Attorney General's lists unavailable to those required to take the Oath, but even if a list or lists were discovered, they could not be relied upon as establishing the complete coverage of the Oath; certainty would be impossible on the negative proposition that there were no other and further listings. The Oath is not therefore so framed that individuals of ordinary intelligence can determine with certainty what is legal and illegal thereunder, and what steps it requires to avoid the penalty of proscription from State employment.

The non-affiliation Oath is further a violation of due process because it imposes an unreasonable restraint on freedom of association. The uncertainty as to what organizations are covered by the Oath results in a fear, and thus a restraint, of association with *all* organizations concerned with political, social, or economic questions. Further, the Oath is not a reasonable fitness requirement, and exceeds any employment qualification approved by this Court, in that it establishes affiliation in organizations other than those advocating overthrow of the government as a conclusive barrier to State employment.

In addition, the Attorney General's listing of an organization only means that he regarded it as suspicious to the degree where membership therein might be an indication, subject to refutation by the member, of unsuitability for government employment. Oklahoma is obviously unreasonable in proscribing a person from State employment because of affiliation with an organization about which it has only been determined that membership therein can be regarded as *some evidence* of disqualification for government employment. Finally, affiliation with organizations listed as "subversive" could not in any event be used as a conclusive reason for proscription from employment, where, as here, there is grave doubt as to the fairness and accuracy of the listings.

III. Besides having the constitutional infirmities of the provision on current affiliations, the Oath as to past membership is a violation of the constitutional prohibition against ex post facto laws and bills of attainder. This provision cannot be regarded as a test of fitness for employment, for it does not weigh past acts to determine present personal qualification, but instead makes past association an irrebuttable cause for proscription from employment. Rather than testing fitness the Legislature through the Oath on past membership, imposes a severe punishment,—proscription from all opportunity for State employment,—on the basis of acts which were not penalized at the time they were undertaken; it marks groups for punishment by and for their past acts without affording them any way to avoid the penalty by present conduct.

ARGUMENT

I. The State's requirement of an oath to bear arms as a condition for any employment by the State, is an unconstitutional deprivation of the freedom of religion and opinion guaranteed by the Fourteenth Amendment.

Five of appellants refused to subscribe to the provision of the Oath "that I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary", because their religious faith is opposed to bearing arms (R. 30-31, 32, 41, 43, 52). The contradiction between the Oath and the appellants' religious belief was not mitigated by the State court's construction of the Oath to mean that the jurator would bear arms if so directed by law (R. 63, 68); for, despite the time-honored respect for conscientious objectors, Congress might, as the State court pointed out (R. 68), abrogate their traditional statutory exemption.

There is no doubt under the decisions of this Court that Oklahoma's requirement that appellants either forswear their religious practice and conviction—with a perjury penalty for false swearing—or sacrifice their State employ-

ment, constitutes an interference with the freedom of religion protected by the Fourteenth Amendment. For the State inflicts a serious loss when it deprives an individual of his employment by the State, and forecloses him from opportunity for State employment; it therefore exerts a strong compulsion, when it attaches conditions to State employment, towards compliance with the conditions.[1] Here the interference with the Fourteenth Amendment freedoms through the conditioning of State employment is wholly unjustified, and is therefore unconstitutional.

Even when religious belief is expressed in overt acts, the State may not, under the Amendment, interfere with freedom of religion except on the most urgent grounds; and the guarantee against interference with belief itself is "absolute".[2] Oklahoma's statute invades the "forbidden domain" of belief itself.[3] For it does not penalize conduct:

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[1] See *American Communications Association* v. *Douds*, 339 U. S. 382, where the sanction for refusal to take a "non-Communist" Oath was probable loss of employment as a trade union officer, and, in determining whether the restraint thus imposed on First Amendment rights was justifiable, it was said: "indirect 'discouragements undoubtedly have the same coercive effect upon First Amendment rights as imprisonment, fines, injunctions, or taxes * * * for this reason * * * the effect of the statute in proscribing beliefs must be carefully weighed * * *'" (339 U. S. at p. 399). The opinion made it clear, by reference to *United Public Workers* v. *Mitchell*, 330 U. S. 75, that its reasoning would be equally applicable to a requirement of an Oath as a condition of Government employment (see 339 U. S. at p. 402). See also *United States* v. *Lovett*, 328 U. S. 303; *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 185 (Jackson, J., concurring), as to gravity of a loss of opportunity for Government employment.

[2] *Cantwell* v. *Connecticut*, 310 U. S. 296, 303. And see *Martin* v. *Struthers*, 319 U. S. 141; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624.

[3] *United States* v. *Ballard*, 322 U. S. 78, 86-87. This Court has never expressed an opinion favorable to an Oath or employment qualification based on belief. In the *Douds* case, the lower court's judgment, insofar as it upheld the provision of the Oath relating to belief, was affirmed by an equally divided court, and therefore cannot be taken as an expression of opinion by this Court. *Hertz* v. *Woodman*, 218 U. S. 205.

—a failure to take up arms,—but a state of mind as to a possible future command; it is directed at a lack of intention and an unwillingness to bear arms if so ordered. But even if the Oath is viewed as a restraint on religious practice rather than belief, it can find no justification.

For, though it is granted, as this Court held in the *Garner* case,[4] that the State may establish tests for fitness of its employees, willingness to bear arms has no reasonable relation to fitness for State employment. Allegiance to the United States does not import a willingness to bear arms, nor is such willingness a part of attachment to the principles of the Constitution, nor a necessary duty of good citizenship.[5]

While this Court reasoned in *Garner* that "loyalty" relates to fitness, the State court's further steps in this chain:—that willingness to bear arms relates to loyalty and therefore must relate to fitness (R. 68)—were based on a misconception of this Court's meaning when it spoke of loyalty. For this Court discussed loyalty as an attribute of fitness for Government employment by analogizing to the loyalty expected by a private employer;[6] loyalty in this sense means an identity of interests sufficient to assure the faithful performance of duties and to negative use of the position for acts inimical to the employer. The "loyalty" customarily sought by an employer, to which this Court referred, does not involve a search of the employee's heart and mind to determine his abstract beliefs or the conformity of his general credo with the employer's. We suggest that this Court erred in the *Garner* case in concluding that an Oath of non-advocacy of overthrow of the Government,—even if overthrow is advocated merely as an abstract and ultimate goal,—can reasonably be used as a test of fitness for all Government positions indiscriminately.

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[4] *Garner* v. *Los Angeles Board*, 341 U. S. 716.

[5] *Girouard* v. *United States*, 328 U. S. 61, 65, 66, 68, 69.

[6] 341 U. S. at p. 720.

In any event, in the case of unwillingness to bear arms, this belief does not signify any type of dissatisfaction with our form of government, but merely a disagreement with majority opinion as to the right method of defending it; thus, such unwillingness is no basis whatever for supposing disloyalty in the sense of inclination to infidelity to duty in a non-military Government job.[7] In approving a loyalty test as a test of fitness for Government employment, this Court could not have intended the States to read "loyalty" to mean conformity to orthodox opinion.

The evil of a Test Oath,—that it presumes disloyalty[8]—is compounded in Oklahoma's Oath by a novel extension of the disavowals the jurator must make to refute the presumption. Oklahoma's extension of its employee "loyalty" test to require a sacrifice of conviction and a commitment as to opinion that has no reasonable relation to employee fitness, is an unjustifiable and unconstitutional interference with the freedom of religion and opinion protected by the due process clause of the Fourteenth Amendment.

II. The State's requirement of an oath of non-affiliation with unnamed organizations, as a condition for any employment by the State, violates the due process guarantee of the Fourteenth Amendment because it involves an excessive delegation of legislative power, and because it is vague, uncertain, and an unreasonable restraint on freedom of association.

The highest State court construed the Oath provision "that I am not affiliated directly or indirectly with * * * any foreign political agency, party, organization, or Gov-

[7] The fact that Congress might be justified by a military emergency in penalizing a refusal to bear arms, of course does not support the constitutionality of Oklahoma's interference with First Amendment freedoms through penalizing an unwillingness to bear arms in its regulation of employment, since the purported justification and rationale of the two measures are wholly different.

[8] See *Ex Parte Cummings*, 4 Wall. 277, 331.

ernment, or with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization" to mean "I am not affiliated with any organization on any list or lists of communist front or subversive organizations which had been prepared by the Attorney General prior to April 9, 1951, the date of passage of the Act" (see R. 63). We suggest that the State court's drastic paraphrasing of the Oath can hardly be justified as an effectuation of legislative intent,[9] and involves an assumption of the legislative power to re-draft the statute, rather than merely the authority to interpret it. But assuming the State court's rendition of the Oath to be within judicial authority, it cures none of the Oath's Constitutional infirmities.

A. The non-affiliation provision of the Oath violates the guarantee of due process because it involves an excessive delegation of legislative power to the United States Attorney General.

The Legislature formulated no policy and came to no determination as to the organizations with which affiliation is proscribed, other than that they should have been deemed by the United States Attorney General to be "a communist front or subversive."

For the State court indulged in a convenient fiction, rather than a factual deduction, when it "assumed" (R. 63), without any supporting data, that the Legislature had appraised for itself the character of the organizations covered by the Oath.[10] If the Legislature intended to adopt,

[9] It is obvious that the legislature intended the Oath to cover for each jurator any organization listed prior to his entering State employment, and that it did not intend to proscribe organizations on past lists, which might be extinct, while permitting affiliation with currently listed organizations.

[10] This Court "must review independently" the facts essential to the adjudication of Federal constitutional questions. *Oyama* v. *California*, 332 U. S. 633, 636. See also *Chambers* v. *Florida*, 309 U. S. 227, 228-229; *Norris* v. *Alabama*, 294 U. S. 587, 590.

as some of the legislators sponsoring the statute explained,[11] the list of approximately 2500 organizations set forth by the House Un-American Activities Committee in 1951 as its "Guide to Subversive Organizations and Publications," it is apparent that the Legislature could not have deemed it necessary, and could not have undertaken, to investigate the organizations it intended to proscribe. And unless this view of the Oath's coverage is accepted as the Legislature's intention, it is clear that the Legislature did not feel it necessary even to consider what list or lists were covered by the Oath, since there is no hint that it knew of the existence of any list by an "authorized agency" other than the list of 2500. Needless to say, the Legislature's failure to focus on any particular list or lists necessarily precludes the possibility that the Legislature considered the character of the listed organizations.

The Legislature's view that it was unnecessary for it to appraise for itself the organizations it was proscribing—so irrefutably demonstrated with respect to the organizations listed by "any authorized agency"—logically must have prevailed when it referred to the list or lists of the Attorney General. In any event, the Legislature's ignorance specifically of the Attorney General's lists, and *a fortiori* its failure to appraise the conduct and character of the organizations included on them, is demonstrated by the fact that the Oath refers to organizations listed as "communist, front or subversive." Since the Attorney General lists organizations as "communist" but does not use the designation "communist front",[12] it is apparent that the Legislature would have included the former term in the

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[11] See legislative background, recited in Brief of Board of Regents in the Supreme Court of the State of Oklahoma in the instant case, pages 29, 31 (a copy of this brief has been filed with the Clerk of this Court).

[12] See classification used by Attorney General, 5 C. F. R., 1949, c. II, Pt. 210, pp. 203-205, 13 Fed. Reg. 6137-6138.

Oath if it had been familiar with the Attorney General's lists.[13]

Thus, it is clear that the Oklahoma legislature accepted the Attorney General's determination of what organizations it should proscribe for State employees, with no limitation other than that he deem them "a communist front or subversive." In using such a loose and imprecise standard[14] the Legislature abdicated its legislative power to the Attorney General; failing to crystallize its intention beyond this vague generality, the Legislature adopted, sight unseen, whatever policy the Attorney General had read into these broad and elastic terms, accepting his arbitrary discretion. When the Legislature in effect states, as it has here, that it bars from employment members of any organizations the Attorney General has chosen to disapprove, it has not adequately and sufficiently exercised the legislative function to comport with due process of law.[15]

B. The Oath violates the guarantee of due process because the scope of its prohibition is vague and uncertain.

A further unconstitutional result of the Legislature's lack of care and precision is the impossibility of the juror's determining with certainty what the Oath prohibits. As construed by the State court, the statute imposes, as a condition of State employment, the necessity for ascertaining all the lists that had been prepared by the United

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[13] It can hardly be supposed that the Legislature, while failing to scrutinize the Attorney General's lists carefully enough to note this distinction in nomenclature, nevertheless noted and appraised the listed organizations.

[14] The word subversive "will mean one thing to one officer, another to someone else." See *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 176 (Douglas, J., concurring).

[15] The due process clause of the Fourteenth Amendment insures the orderly exercise of legislative power in the mode customary under the State Constitution, and prohibits arbitrary and unchanneled discretion. *See Douglas* v. *Noble*, 261 U. S. 165, 168; also *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 542-3; *Yick Wo.* v. *Hopkins*, 118 U. S. 356.

States Attorney General prior to April 9, 1951, with no guidance as to when or where the list or lists were published or what period a search for them must cover. The State court again assumed a fiction when it "assumed they (the lists) are readily obtainable" (R. 63). In fact, the only copies of any of the Attorney General's lists available in Oklahoma were a few of a "consolidated list" issued in October 1950, which were in the State law library.[16] But even if this list were obtained, the State employee could not depend upon it, or any other one or ones he discovered, as exhausting the indefinite and generally-inclusive coverage of the Oath;[17] he could never be certain of the negative proposition that there were no additional listings. While the State Attorney General referred to the 1950 list in his opinion on the Oath's application, he did not purport to rule, and probably did not know, whether this list was the most recent or definitive prior to the passage of the Act,[18] nor had the Legislature empowered him or any other agent to make such a determination.

An Oath which thus "fails to give adequate guidance to those who would be law-abiding",[19] and creating such un-

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[16] See Board of Regents' brief cited note 11, at page 31. As pointed out by appellants (brief, p. 63), the Attorney General's listing program was not directed at making the lists available to the public but only to the Loyalty Boards.

[17] The October 1950 list was not of course the only list compiled by the Attorney General. Indeed, this Court's opinion in *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, decided April 30, 1951, does not refer to the October 1950 list, but instead refers to several preceding lists. See 341 U. S. at pages 128-129, notes 3 to 5. The possibility, if a list were discovered, of a conscientious, but mistaken, reliance upon it without knowledge of other listings, is thus apparent.

[18] See Board of Regents' Brief, cited note 11, at page 29.

[19] *Musser* v. *Utah*, 333 U. S. 95, 96. Semble: *Connolly* v. *General Construction Co.*, 269 U. S. 385, 391; *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453; *Pierce* v. *United States*, 314 U. S. 306, 311; *Winters* v. *New York*, 333 U. S. 507, 509-510.

certainty as to what is required to avoid the penalty of proscription from Government employment or a prejury prosecution, violates due process. And with the instant Oath, the Constitutional vice cannot be avoided as it was in the *Garner* case,[20] through importing the requirement of knowledge. For the State court has already indicated, by its validation of the Oath on the false assumption that the lists are readily available (R. 63) that the Oath-taker must be *certain* that none of the organizations with which he is affiliated have at any time prior to April 9, 1951 been listed by the Attorney General.[21]

C. The Oath violates the due process guarantee because it unreasonably restrains freedom of association.

1. Excessive Restraint Due to Uncertainty

Uncertainty is a particular vice in a statute affecting First Amendment rights because it necessarily results in an excessive restraint on these essential rights. And the evil of uncertainty is the greatest when the statute impinges on political expression, its protection being the most important function of the First Amendment. Thus, this Court in a nearly unanimous opinion in *Winters* v. *New York*, condemning for vagueness the statute there in issue, which penalized the publication of "stories of bloodshed", declared: "The present case as to a vague statute abridging free speech involves the circulation of only vulgar magazines. The next may call for decision as to free expression of political views in the light of a statute intended to punish subversive activities."[22]

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[20] *Garner* v. *Los Angeles Board*, 341 U. S. 716, 724.

[21] The Legislature could hardly have meant to refer to knowing affiliation, since this construction would permit a person affiliated with a listed organization to lawfully take the Oath if he were ignorant of the listing, even if he had made no effort to ascertain the contents of the lists. And to construe the Oath as requiring some unspecified amount of effort to ascertain the contents of the lists, would merely again establish a vague and indefinite requirement.

[22] 333 U. S. 507, at page 518.

The right affected by the instant statute is precisely the kind where uncertainty is, according to this Court's suggestion in *Winters*, most noxious. For the non-affiliation Oath restrains a person's right to associate with his fellows of a like turn of mind to develop and express political, social, and economic views; this right—the right to assemble and associate—is "cognate to" and "inseparable from" the right of expression.[23] The Oklahoma Oath, showing on its face that a determination of its exact scope would be difficult if not impossible, would tend to cause a blanket abandonment, without an effort to ascertain its coverage, of association with any politically-focussed organization; and even if one set about an investigation of the Oath's meaning, he could not, as demonstrated above, achieve certainty as to the total of proscribed organizations. Thus, one subject to the Oath could not affiliate or continue affiliation with any organization dealing with political, social, or economic questions with assurance of legality; through any such affiliation he would fear he was violating the Oath and incurring the penalty of proscription. Thus, the Oath "offers * * * security"[24] only through total abstinence from association for societal objectives; it "blankets with uncertainty"[25] and thereby restrains this whole field of association for the large part of the population who either are State employees, or foresee the possibility of seeking State employment.

Assuming, arguendo, the validity of a conclusive bar to employment in terms of associations, Oklahoma's non-affiliation Oath is nevertheless clearly unconstitutional because it imposes an unjustifiably broad restraint on First Amendment freedoms by its indefiniteness and uncertainty.[26]

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[23] *De Jonge* v. *Oregon*, 299 U. S. 353, 364; *Thomas* v. *Collins*, 325 U. S. 516, 530-531. See *American Communications Association* v. *Douds*, 339 U. S. 382, 400.

[24] *Thomas* v. *Collins*, 323 U. S. 516, 535.

[25] *Ibid.*

[26] Compare, as to over-broad restraints, *Cantwell* v. *Connecticut*, 310 U. S. 296, 307; *Schneider* v. *State*, 308 U. S. 147, 162, 164; *Saia* v. *New York*, 334 U. S. 558, 562, 564.

2. Unreasonableness of Oath as Test of Fitness.

Even apart from the Oath's uncertainty and indefiniteness, it establishes an unreasonable bar to State employment and is therefore unconstitutional. At the outset, it is to be noted that insofar as this Court has indicated that affiliation alone, regardless of the affiliator's personal viewpoint, might ever be a conclusive bar to employment, it has dealt exclusively with organizations advocating or attempting overthrow of the government.[27] We submit that a conclusive proscription from employment because of any other affiliation is beyond the limits of the State's power to interfere with freedom of association. For from the standpoint of the Oath's purported objective of testing fitness, no other affiliation could be deemed an identification of persons unfit for all State employment; and from the standpoint of the detriment of an Oath, obviously the restraint on freedom of association would be broader and much more serious in its impact on free expression if affiliations other than with organizations advocating overthrow, were restrained. Since the sweeping prohibition of the Oklahoma Oath of affiliation with "communist front or subversive" organizations, restrains association with organizations other than those advocating overthrow of the Government, it is unconstitutional.

Furthermore, in view of the Attorney General's criterion for listing organizations as "subversive"—the only one of the Oath's terms he uses—Oklahoma's conclusive proscription from employment on the basis of affiliation with a listed organization is manifestly unreasonable. As this Court knows, when the Attorney General listed "subversive" organizations, he was defining and applying this nebulous term for the purpose of listing those organizations in which membership should be deemed some evi-

[27] Consider *Garner* v. *Los Angeles Board*, 341 U. S. 716, 720; *Adler* v. *Board of Education*, 342 U. S. 485, 495; *American Communications Assn.* v. *Douds*, 339 U. S. 382; *Gerende* v. *Board of Supervisors*, 341 U. S. 56.

dence of disqualification for Federal government employment; it was only necessary for the organization to be suspicious to the degree where membership therein might be an indication, subject to refutation by the member, that he was not suitable for government employment.[28] It is obviously unreasonable to lay down an absolute proscription from employment on the basis of membership in an organization about which nothing has been determined except that membership may be treated as *some evidence* of disqualification.[29]

As this Court further knows, it has not been established that any of the Attorney General's listings have a reasonable basis, and there is grave doubt of whether the Attorney General's procedure is a fair one that is conducive to an accurate finding or to any confidence in his determinations.[30] Certainly affiliation with a listed organization is not a reasonable bar to employment on the basis of the listing as such, unless the affiliator has reason to accept the listing as valid. For Oklahoma to compel a person to bow to the Attorney General's listings, and inflict on him the penalty of proscription from employment if he does not accept them, regardless of whether they are arbitrary, is clearly an unreasonable restriction of his opportunities for employment and of freedom of association.

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[28] See *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, at page 127, note 2; at page 192 (dissenting opinion).

[29] The State court gave no consideration to the justifiability of the Legislature's use of the Attorney General's lists, indulging instead in the false assumption that the Legislature had considered the character of the listed organizations (discussed supra, pp. 9-11).

In view of the Legislature's falure to acquaint itself with the proscribed organizations or even with the pattern for listing them (supra, pp. 9-11), there was no such legislative deliberation as might justify any presumption of the reasonableness of proscribing them. As to the doctrine that a presumption does not in any event apply where the statute, as the instant one, affects First Amendment rights, see *Thornhill* v. *Alabama*, 310 U. S. 88, 95, 96.

[30] *Anti-Fascist Committee* v. *McGrath*, cited supra.

III. The State's prohibition of any employment by the State except upon subscription to an oath denying past membership in unnamed organizations, violates the due process guarantee of the Fourteenth Amendment and Article I, Section 10, of the Constitution prohibiting bills of attainder and *ex post facto* laws.

The provision that "within five years immediately preceding the taking of this oath, I have not been a member * * * of any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization", was interpreted by the State court to read that "within the five years immediately preceding the taking of this Oath, I have not been a member of any organization listed by the Attorney General as 'a communist front or subversive' prior to the date of passage of the Act, April 9, 1951" (see R. 63-64). Like the provision on current affiliations discussed in Point II, the Oath on past membership—despite its drastic paraphrase by the State court to refer, regardless of when taken, to listings before a fixed date in 1951—violates the due process guarantee of the Fourteenth Amendment. For, the past membership provision (1) accepts the arbitrary discretion of the Attorney General by adopting whatever meaning and policy he has read into the vague and elastic terms "communist front or subversive" (see supra, pp. 9-11); (2) the uncertainty as to the Oath's coverage (supra, pp. 11-12) means one must either suffer proscription from all State employment through refusing to take the Oath or risk sudden and stigmatizing forfeiture of his job and the charge of false swearing; and (3) this provision prohibits absolutely the employment of past members of organizations in which membership has merely been determined to be some indication of disqualification for Government employment, with the

fairness and trustworthiness even of this determination in grave doubt (supra, pp. 15-16).

But the past membership provision has vices in addition to those found in the current affiliation provision of the Oath. It is even more unreasonable and unprecedented, if viewed as an employment qualification, than the Oath on current affiliations. For it not only relies on affiliation, apart from the affiliator's personal belief, in organizations other than those advocating overthrow of the government (see supra, p. 15), but it goes to the very extreme in its reliance on "guilt by association" by proscribing from employment on the basis of *past* association with such organizations.[31] Not only does the Oath as to past membership thus violate due process, but it imposes an *ex post facto* penalty in violation of Article I, Section 10, of the Constitution.

Clearly the loss of one's means of livelihood and proscription from all opportunity for State employment is a drastic punishment. "Permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type" (*United States* v. *Lovett*, 328 U. S. 303, 315), particularly since "government employment so dominates the field of opportunity" (*Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 185, Jackson, J. concurring). Here the punishment of proscription from employment is imposed because of conduct which was not so penalized, nor indeed in any way held culpable by the State at the time thereof, nor even penalized, either then or now, by the Federal government in relation to Federal employment, as it now is by Oklahoma. Thus the Oklahoma Oath is precisely within the definition of an *ex post facto* penalty. For this Court, noting in *Garner* v. *Los Angeles Board* that "legislative action curtailing a privilege previously enjoyed" may be punishment, further pointed out that an Oath requirement "would be *ex post facto* if it imposed punishment for

[31] Compare cases cited, note 27, supra.

past conduct lawful at the time it was engaged in" (341 U. S. 716, 721, 722).

Indisputably, the Oklahoma Oath is entirely distinguishable from that upheld in the *Garner* case, which was saved from condemnation as *ex post facto* because its provisions had previously been incorporated in the City Charter. The explicit grounds for the Court's ruling in *Garner* was that "The activity covered by the oath had been proscribed by the Charter in the same terms, for the same purpose, and to the same effect over seven years before, and two years prior to the period embraced in the oath" (341 U. S. at p. 721). Similarly, in the conclusion quoted by the State court (R. 69) that punishment was not imposed by the *Garner* Oath, and in distinguishing the *Garner* situation from that in the *Lovett* case, this Court relied on the fact that the Oath was merely an implementation of the Charter provisions which had laid down "general and prospectively operative standards of qualification" (341 U. S. at p. 722). Contrariwise, the Oklahoma Oath as to past membership operates entirely retroactively; there was no proscription in effect prior to its passage with respect to organizations listed by the Attorney General, nor ever had Oklahoma prohibited State employment for members of organizations advocating overthrow of the government.

Indeed, like the Oaths in the *Cummings* and *Garland* cases,[32] this Oath is not only *ex post facto* but a bill of attainder. Here as there, the legislature has singled out ascertainable groups for punishment, identified by their past acts, without giving them any opportunity to avoid the penalty through present or future conduct. As this Court pointed out in *American Communications Assn.* v. *Douds*, in discussing the vice of the Oaths invalidated in the *Cummings* and *Garland* cases: "since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change

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[32] *Cummings* v. *Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333.

the result" (339 U. S. 382, 414).[33] Indeed, the language of the *Garland* case is almost precisely applicable to Oklahoma's Oath:

> "As the oath prescribed cannot be taken by * * * (certain) parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the * * * ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. The exaction of the oath is the mode provided for ascertainment of the parties upon whom the act is intended to operate * * *" (4 Wall. at p. 377).

Finally, here as with the *Cummings* and *Garland* oaths, the argument that the Oath can be justified as a test of fitness must be rejected (see 4 Wall. 318-319, 379-380); for here as there past acts are not to be weighed in order to determine present personal qualification, but are used instead to establish a conclusive proscription from employment and employment opportunities.

The retroactively punitive aspect of the Oklahoma Oath is not only a violation of specific Constitutional limitations, but it also accentuates the restraint on freedom of association imposed by the Oath. For all associations will be approached fearfully and with restraint, if the State may, as in this Oath, seize on associations treated as innocent at the time for penalization at some unforeseeable time in the future.

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[33] The Court held that the Oath involved in the *Douds* case was not a bill of attainder because it barred a person from employment only on the basis of his present or future affiliation (339 U. S. at p. 414).

CONCLUSION

It is respectfully submitted that the judgment of the Court below should be reversed, and that Court should be directed to order appellees to make salary payments to appellants without regard to their failure to subscribe to the Oath provisions here in issue.

Respectfully submitted,

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